

² The Board notes that, following February 3, 2021 nonmerit decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

2020; and (2) whether OWCP abused its discretion in denying appellant's request for a hearing pursuant to 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On May 29, 2020 appellant, then a 42-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on May 20, 2020 she sustained a left knee bruise and contusion when she was standing at the back of her truck and a van backed up striking her truck causing the rear bumper to strike her knee while in the performance of duty. She stopped work on the date of injury. OWCP accepted the claim for left knee contusion. Appellant returned to work on July 23, 2020 with restrictions limiting work to two hours per day. OWCP paid compensation on the supplemental rolls from July 7 through September 24, 2020.

In a duty status report (Form CA-17) dated August 4, 2020, Dr. Anthony Thompson, an osteopathic physician specializing in occupational medicine and family medicine, diagnosed left knee pain and contusion due to the accepted May 20, 2020 employment injury. He provided work restrictions, which included no bending, stooping, kneeling, or climbing, lifting no carrying more than 15 pounds, up to two hours of intermittent walking and standing, and up to nine hours of intermittent sitting, twisting, simple grasping, reaching above the shoulder, pulling/pushing, and fine manipulation.

An August 7, 2020 magnetic resonance imaging (MRI) scan revealed no left knee internal derangement and intact patellofemoral compartment.

In a September 25, 2020 chart note, Dr. Thompson provided examination findings and diagnosed left knee contusion. He noted that appellant related no change in her knee condition and that her knee pain was aggravated by movement and bending.

In a letter dated October 1, 2020, OWCP informed appellant that an appointment had been made for a second opinion evaluation to assess her work-related condition. It also prepared a statement of accepted facts (SOAF) and list of questions for the referral physician to address. The questions included a list of all diagnoses related to the accepted May 20, 2020 employment injury, her prognosis, was appellant capable of performing her date-of-injury job, and were work restrictions warranted if appellant was unable to return to her date-of-injury job. The October 1, 2020 letter referred to an attachment for the time, date, and location of the appointment.³

On October 14, 2020 appellant filed a claim for compensation (Form CA-7) for disability from work for the period September 26 through October 9, 2020. In an attached time analysis form (Form CA-7a), appellant claimed she used six hours of leave without pay (LWOP) and worked two hours each day during the claimed period,⁴ with a total of 54 hours of LWOP and 18 hours of work.

³ The Board notes that there is no such attachment in the case record.

⁴ Appellant noted that she had been released to four hours of light-duty work, but the employing establishment only had two hours of work available within her restrictions.

Dr. Thompson, in an October 23, 2020 chart note, reported that appellant was seen for increased knee pain. Appellant stated that she attributed the increased knee pain to physical therapy, which she recently underwent. Dr. Thompson diagnosed left knee contusion and associated joint tenderness symptoms.

In a development letter dated October 19, 2020, OWCP informed appellant that the evidence of record was insufficient to establish her claim for wage-loss compensation. It advised her of the type of medical evidence required and afforded her 30 days to respond.

On October 29, 2020 appellant filed a Form CA-7 claiming disability from work for the period October 10 through 23, 2020. In an attached Form CA-7a, she noted six hours of LWOP and two hours of work each day for the claimed period, with a total of 54 hours of LWOP and 18 hours of work.

In a development letter dated October 30, 2020, OWCP informed appellant that the evidence was insufficient to support her claim for wage-loss compensation for the period October 10 through 23, 2020 and continuing. It advised her of the type of medical evidence required and afforded her 30 days to submit the requested evidence.

OWCP subsequently received a report dated September 17, 2020 from Dr. Joseph Cohn, an orthopedic specialist, who noted appellant's history of injury and medical treatment. Dr. Cohn related that appellant was seen for pain complaints in the left knee anterior posterior aspects due to the May 20, 2020 employment injury. Physical examination findings of appellant's left knee included antalgic gait, normal alignment and skin, no swelling, edema or ecchymosis, mild effusion, and restricted range of motion (ROM) due to pain. A review of x-ray interpretations revealed minimal joint space narrowing without evidence of periarticular medial osteophytes, well-maintained patellofemoral joint, no evidence of any loose bodies, and well-maintained lateral joint. Dr. Cohn diagnosed left kneepain, left knee contusion and right lower leg muscle and tendon strain. He explained that appellant sustained an injury to the left knee anterior aspect in the suprapatellar area in the region of the insertion of the quadriceps tendon. Dr. Cohn's examination findings were consistent with a diagnosis of chronic quadriceps insertional tendinitis and that he could not rule out an occult tear. He related that he modified appellant's work restrictions based on her symptoms.

A November 6, 2020 chart note from Dr. Thompson was similar to his prior reports.

Appellant continued to file CA-7 forms claiming continued disability from work.

By decision dated December 1, 2020, OWCP denied appellant's disability claim for the period September 26 through October 9, 2020. It found that the evidence of record was insufficient to establish disability from work during the claimed period.

By separate decision dated December 1, 2020, OWCP denied appellant's disability claim for the period October 10 through 23, 2020. It found that as Dr. Thompson's October 23, 2020 chart note only mentioned a workers' compensation follow up without providing any prognosis, plan of care, work restrictions or recommended treatment, appellant failed to establish that she was disabled from performing her regular work duties and was not entitled to wage-loss compensation.

Following the December 1, 2020 decisions, OWCP received additional medical evidence from Dr. Thompson and Dr. Cohn.

On January 12, 2021 OWCP re-requested a referral to a second opinion physician, noting that a prior referral request had been made on October 1, 2020.

On January 12, 2021 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

On January 14, 2021 OWCP referred appellant for a second opinion evaluation with Dr. Frank Luckay, a Board-certified orthopedic surgeon, for an opinion to assess her work-related condition.

By decision dated February 3, 2021, OWCP denied appellant's request for an oral hearing before an OWCP hearing representative as untimely filed.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁵ has the burden of proof to establish the essential elements of his or her claim including the fact that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁶

Under FECA, the term disability means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁷ Disability is, thus, not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.⁸ An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.⁹ When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for loss of wages.¹⁰

The medical evidence required to establish causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of appellant, must be

⁵ *Supra* note 1.

⁶ *A.R.*, Docket No. 20-0583 (issued May 21, 2021); *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁷ 20 C.F.R. § 10.5(f).

⁸ *See A.R.*, *supra* note 6; *L.W.*, Docket No. 17-1685 (issued October 9, 2018).

⁹ *See A.R.*, *id.*; *K.H.*, Docket No. 19-1635 (issued March 5, 2020).

¹⁰ *See A.R.*, *id.*; *D.R.*, Docket No. 18-0323 (issued October 2, 2018).

one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the claimed disability and the accepted employment injury.¹¹

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.¹²

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision.

OWCP accepted the claim for left knee contusion. Appellant returned to work on July 23, 2020 with restrictions limiting work to two hours per day. OWCP paid appropriate compensation for partial disability on the supplemental rolls for the period July 23 through September 24, 2020. Appellant filed Form CA-7 claims for disability from work for the period September 26 through October 9, 2020 and for the period October 10 through 24, 2020. By separate decisions dated December 1, 2020, OWCP denied appellant's claims for disability, finding that the evidence submitted was insufficient to establish disability from work during the claimed period.

On October 1, 2020 OWCP prepared a SOAF and referred appellant for a second opinion evaluation to determine the extent of her work-related condition. However, the record reflects that OWCP issued decisions denying appellant's claims for disability prior to obtaining a second opinion report.

It is well established that proceedings under FECA are not adversarial in nature and, while appellant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹³ It has an obligation to see that justice is done.¹⁴ Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.¹⁵ In this case, OWCP began further development of the evidence regarding the extent and nature of appellant's condition including work restrictions when on October 1, 2020 it informed appellant that she was being referred for a second opinion evaluation. It, however, did not complete the referral process and did not obtain a second opinion report prior to the December 1, 2020 decisions denying appellant's wage-loss claims. Once OWCP undertook development of the evidence by referring appellant's case for a second opinion evaluation, it had an obligation to do a complete job and obtain a proper evaluation

¹¹ See *A.R., id.; Y.S.*, Docket No. 19-1572 (issued March 12, 2020).

¹² *A.R., id.; J.B.*, Docket No. 19-0715 (issued September 12, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹³ See *R.S.*, Docket No. 20-1448 (issued April 12, 2021); *R.B.*, Docket No. 20-0109 (issued June 25, 2020); *B.W.*, Docket No. 19-0965 (issued December 3, 2019).

¹⁴ See *A.J.*, Docket No. 18-0905 (issued December 10, 2018); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983); *Gertrude E. Evans*, 26 ECAB 195 (1974).

¹⁵ *D.G.*, Docket No. 20-1183 (issued May 26, 2021); *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

and report that would resolve the issue in this case.¹⁶ The Board will, therefore, set aside OWCP's December 1, 2020 decisions and remand the case for OWCP to review the second-opinion report received following the December 1, 2020 decisions. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.¹⁷

CONCLUSION

The Board finds that this case is not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the December 1, 2020 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with decision of the Board.

Issued: December 6, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁶ See *R.L.*, Docket No. 20-1069 (issued April 7, 2021); *W.W.*, Docket No. 18-0093 (issued October 9, 2018); *Peter C. Belkind*, 56 ECAB 580 (2005).

¹⁷ In light of the Board's disposition of Issues 1, Issue 2 is rendered moot.